One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin

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In 2002, the Supreme Court of Canada dismissed Louise Gosselin’s Charter challenge to a Québec welfare regulation that reduced benefits for those under-30 by two-thirds, forcing them to choose between hunger and homelessness. The article examines the legacy of Gosselin for the rights and constitutional inclusion of people living in poverty. It first considers the important jurisprudential step forward in the case: the Supreme Court’s rejection of the argument, at odds with the expectations of disadvantaged groups and with Canada’s international socio-economic rights obligations, that s. 7 cannot impose positive obligations on governments. The article then considers the court’s two steps back in the Gosselin case: the majority’s approach to the evidence and its treatment of Louise Gosselin’s substantive argument. The article argues that Charter claimants in poverty cases continue to face prejudicial stereotypes and disproportionate evidentiary burdens. Their s. 7 claims are also consistently reframed by the courts and then found to be non-justiciable. The article concludes that the Supreme Court’s failure to revisit Gosselin, or even to grant leave to appeal in any poverty case since then, represents a serious failure of constitutionalism in Canada.

En 2002, la Cour suprême du Canada a rejeté la contestation constitutionnelle déposée par Louise Gosselin à l’encontre d’une réglementation québécoise en matière d’aide sociale ayant réduit de deux tiers les prestations versées aux personnes de moins de trente ans, obligeant ces derniers à choisir entre la faim et l’itinérance. Dans cet article, l’auteure analyse l’impact de la décision rendue dans l’affaire Gosselin sur les droits et l’inclusion constitutionnelle de personnes vivant en situation de pauvreté. Elle considère tout d’abord l’importante affirmation, du point de vue jurisprudentiel, que l’on retrouve dans la décision : le rejet par la Cour suprême de l’argument selon lequel l’article 7 de peut imposer d’obligations positives aux gouvernements, le tout en contradiction avec les attentes des groupes désavantagés et les obligations internationales du Canada en matière de droits sociaux économiques. L’auteure s’intéresse ensuite aux reculs effectués dans l’affaire Gosselin : l’approche des juges majoritaires concernant les éléments de preuve et leur traitement de l’argument de fond articulé par Louise Gosselin. L’auteure fait valoir que les demandeurs qui invoquent la Charte dans des dossiers se rapportant à la pauvreté vont continuer de faire l’objet de stéréotypes défavorables et de subir des fardeaux de preuve disproportionnés. Leurs

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réclamations fondées sur l'article 7 sont également constantement recadrées par les tribunaux et considérées comme étant non justiciables. L'auteure conclut que le fait que la Cour suprême n'ait pas procédé à la révision de la décision rendue dans l'affaire Gosselin, voire de refuser toute autorisation d'appel depuis cet arrêt dans tous les cas soulève la question de la pauvreté constitue un échec important du constitutionnalisme au Canada.

1. INTRODUCTION

In his 1989 judgment for a unanimous court in Irwin Toy Ltd. v. Québec (Procureur général), former Chief Justice Brian Dickson concluded that the intentional exclusion of property rights from s. 7 of the Canadian Charter of Rights and Freedoms meant that "corporate-commercial economic rights" were not protected. He went on to affirm, however, that s. 7's guarantee of security of the person could be read to include "economic rights fundamental to human life or survival." As Chief Justice Dickson explained:

Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights included in international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.

In the late 1980s, Louise Gosselin launched such a socio-economic rights challenge, to a welfare regulation in Québec that reduced benefits for recipients under the age of 30 to one-third the amount the government had determined was required to meet basic needs. Ms. Gosselin argued the regulation was not only age-discriminatory, but violated Québec and Canadian Charter guarantees of security of the person. Ten years later, in Gosselin v. Québec (Procureur général), the Supreme Court of Canada dismissed Ms. Gosselin's claim that setting social assistance rates for young welfare recipients at 80% below the

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3 Irwin Toy, supra note 1 at 1003-1004.
4 Ibid.
6 Gosselin (SCC), ibid. (Factum of the Appellant at para. 18).
7 Gosselin (SCC), ibid.
poverty line⁸ was unconstitutional. In her majority judgment, Chief Justice McLachlin held that, although s. 7 might one day be interpreted as imposing positive obligations on Canadian governments to guarantee adequate living standards, the evidence was insufficient to prove a Charter violation in the Gosselin case.⁹

This article will examine the legacy of Gosselin for the s. 7 rights and constitutional inclusion of people living in poverty in Canada.¹⁰ After summarizing the facts and outcome in the case, the article will consider the step forward taken by the Supreme Court in Gosselin: its rejection of the argument that s. 7 cannot impose positive obligations on governments. The article will then examine the court’s two steps back: first, the majority’s approach to the evidence and, second, its approach to Louise Gosselin’s substantive claim, leading it to conclude that the life, liberty and security of young welfare recipients were not infringed by a provincial regulation that effectively forced them to choose between hunger and homelessness.¹¹ The article will conclude that the legacy of Gosselin is a Charter being interpreted and applied by the courts to exclude those most in need of its protection.

2. THE GOSSELIN CASE

In a class action brought on behalf of herself and other young welfare recipients in Québec between 1985 and 1989, Louise Gosselin challenged s. 29(a) of the Regulation respecting Social Aid.¹² That provision, which came into effect

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⁸ In 1987 the benefit rate for those under-30 was $170/month as compared to Statistics Canada’s low-income cut-off of $914/month for a single person living in a large metropolitan area; Gosselin (SCC), ibid. at para. 7; Gosselin (SC), supra note 5 at 1660.

⁹ Gosselin (SCC), ibid. at paras. 82-83.


¹¹ Gosselin (SC), supra note 5 at 1659.

¹² Regulation Respecting Social Aid, R.R.Q., c. A-16, r. 1, s. 29(a) [Regulation].
when Québec's Social Aid Act\(^\text{13}\) was adopted in 1969, reduced the level of financial assistance for those under 30 to roughly one third of the "basic needs amount" deemed under s. 23 of the Regulation to be required to meet a recipient’s basic needs for food, clothing, personal and household requirements, and shelter.\(^\text{14}\) In 1987, for example, while those over the age of 30 were entitled to the basic needs amount of $466/month, recipients under the age of 30 received two-thirds less, or roughly $170/month.\(^\text{15}\)

Amendments to the social assistance regime introduced by the Québec government in 1984 enabled young welfare recipients to increase their benefits to the basic needs amount still almost 50% below the poverty line\(^\text{16}\) if they participated in on-the-job training or community work programs. Benefits could be increased to within $100 of the basic needs amount through participation in remedial education programs.\(^\text{17}\) There were, however, significant administrative delays and numerous barriers to participation in all three programs, compounded by an absolute shortage of available placements.\(^\text{18}\) By the province’s own calculations 85,000 young recipients were vying with recipients over the age of 30 (who could also increase their benefits through program participation) for only 30,000 spaces.\(^\text{19}\) As a result, only 11% of recipients under the age of 30 achieved the full basic needs amount while 73%, including Louise Gosselin for most of the relevant period, were forced to subsist on the $170/month rate.\(^\text{20}\)

(a) Louise Gosselin’s Charter Claim

Louise Gosselin argued that s. 29(a) of the Regulation violated the right to security of the person under s. 7 of the Canadian Charter; the prohibition against age discrimination under s. 15; and the right to "an acceptable standard of living" under s. 45 of Québec’s Charter of Human Rights and Freedoms.\(^\text{21}\) The

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\(^{13}\) Social Aid Act, R.S.Q., c. A-17.

\(^{14}\) Regulation, supra note 12, s. 23; Gosselin (SCC), supra note 5 para. 171; Gosselin (SC), supra note 5 at 1650-51.

\(^{15}\) Gosselin (SCC), ibid. at para. 7; Gosselin (SC), ibid. at 1650.

\(^{16}\) Gosselin (SC), ibid., at 1661.

\(^{17}\) Regulation Respecting Social Aid, supra note 12, s. 35; Gosselin (SCC), supra note 5 at paras. 159-162; Gosselin (SC), ibid. at 1652, 1662.

\(^{18}\) Gosselin (SCC), ibid. (Factum of the Appellant at paras. 114-128); Gosselin (SCC), ibid. at paras. 158-163, 276-286.

\(^{19}\) Gosselin (SCC), ibid. (Factum of the Appellant at para. 114); Gosselin (SCC), ibid., at para. 283.

\(^{20}\) Gosselin (SCC), ibid., at para. 276.

\(^{21}\) Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 45 [Québec Charter]. Section 45 provides: “Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.” See generally: Pierre Bosset & Lucie Lamarche, eds, Droit de cité pour les droit économiques, sociaux et culturels: La Charte...
The evidentiary record submitted by Ms. Gosselin in support of her claim included expert evidence from economists and current and former government officials in the fields of social policy, income security, labour, youth services and education, as well as testimony from a social worker, a dietician, a psychologist, and a physician in a community health practice who had worked closely with young welfare recipients. Ms. Gosselin also submitted extensive documentary evidence, including World Health Organization, Canadian and provincial government and non-governmental reports, statistics and studies. Finally, Ms. Gosselin described the impact of the Regulation on her own life, including her efforts to survive on the under-30 rate and to access the on-the-job training, community work and remedial education programs.

The expert evidence showed that youth living on the reduced rate were malnourished, socially isolated, often homeless, and in poor physical and psychological health. In the words of the trial judge: “Leur situation économique précaire les prive de toute vie sociale et affecte leur santé mental.” Young recipients were faced with an impossible choice: “Le dilemme de ces jeunes est de payer un maigre loyer et de quêter la nourriture, ou de se passer de loyer et de s'abriter tant bien que mal afin d'utiliser le petit montant qu'ils reçoivent pour se nourrir.” Some recipients resorted to prostitution and selling drugs to earn enough money to pay their rent; others attempted suicide. Lack of stable housing, a phone, or presentable clothing made it difficult for recipients to find work. One expert queried: “Quel employeur ira engager une personne qui ne peut pas lui donner un numéro de téléphone pour le rappeler quand des postes ouvrent? Quel employeur ira engager un jeune avec des trous dans ses vêtements?”

quèbècoise en chantier (Cowansville : Éditions Yvon Blais, 2011); David Robitaille, Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain (Brussels : Editions Bruylant, 2011) [Robitaille, Droits économiques et sociaux].

16 At the Supreme Court of Canada, the record in Gosselin totalled 19 volumes and some 5000 pages; see: <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=27418>.

20 Gosselin (SC), supra note 5 at 1655-1661.

24 Gosselin (SCC), supra note 5 (Appellant’s Record, Testimony of Louise Gosselin, vol 1).

25 Gosselin (SC), supra note 5 at 1658-59.

26 Ibid. at 1659 [author’s translation: “Their precarious economic situation deprives them of any social life and affects their mental health.”].

27 Ibid. at 1659 [author’s translation: “The dilemma facing these young people is whether to pay for meagre lodging and beg for their food or to forego rent and find whatever shelter they can, in order to use the small amount they receive to feed themselves.”].

28 Ibid. at 1658.

29 Ibid. at 1659 [author’s translation: “What employer would hire a person who couldn’t provide a telephone number to call when a position opened? What employer would hire a youth with holes in their clothes?”].
Louise Gosselin’s direct experience of the Regulation was one of acute material and psychological insecurity, deprivation and indignity. She was often hungry, in constant fear of not having enough to eat, and suffering symptoms of malnourishment, including anxiety, fatigue, vulnerability to infections and illness, and lack of concentration. In order to obtain food, she was forced to rely on her family and resorted to soup kitchens and other charity-run food programs. As she put it: “Quand quelqu’un me donnait à manger, j’y allais.”

Ms. Gosselin lived in unsafe and substandard housing, and was frequently homeless. She described one basement apartment in which she spent the winter: “C’était mal éclairé, il y avait des ‘bibittes’ partout, ce n’était pas chauffé, j’avais loué chauffé au propriétaire mais on gelait comme des rats, j’avais les pieds bleus l’hiver, j’avais tellement mal aux chevilles que j’avais de la difficulté à marcher, puis j’avais froid.” At times, she exchanged sex for money, food or a place to stay. Ms. Gosselin testified that, of all the things she lacked, paid employment was what she most wanted: “Des amis, avoir une vie sociale, avoir, travailler, ce n’est pas compliqué, moi tout ce que je pensais c’était avoir un travail.” But finding and keeping work under such circumstances was virtually impossible:

Bon il n’y a jamais personne qui m’a rappelée, j’étais incapable de me présenter convenablement devant un employeur puis de me vendre comme bonne ouvrière, j’étais complètement démunie au niveau de l’estime de moi-même puis au niveau de la confiance en moi, mes repas n’étaient pas équilibrés, ma vie sociale non plus, je n’avais absolument rien pour être en forme, pour pouvoir travailler premièrement là, alors souvent les endroits étaient comblés.

Ms. Gosselin pointed out that: “Le système d’aide social constitue le dernier recours des personnes dans le besoin. Pour être admissible aux prestations d’aide sociale, une personne doit être totalement privée de moyens de subsistance. Ce n’est pas par choix que ces personnes s’adressent à l’État, c’est par nécessité.

30 Ibid. at 1658.

31 Gosselin (SCC), supra note 5 (Appellant’s Record, Testimony of Louise Gosselin, vol 1 at 134) [author’s translation: “When someone gave me food, I went.”].

32 Ibid., (Appellant’s Record, Testimony of Louise Gosselin, vol. 1 at 106) [author’s translation: “It was badly lit, there were bugs everywhere, it wasn’t heated. I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold.”].

33 Gosselin (SC), supra note 5 at 1655.

34 Gosselin (SCC), supra note 5 (Appellant’s Record, Testimony of Louise Gosselin, vol 1 at 111) [author’s translation: “Friends, having a social live, having things, working, it’s not complicated, all I thought about was having a job.”].

35 Ibid. (Appellant’s Record, Testimony of Louise Gosselin, vol 1 at 110) [author’s translation: “Well, there was never anyone who called me back. I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren’t balanced, my social life wasn’t either, I had absolutely nothing to keep myself together, to work, so often the places were filled.”].
absolue.”^36 Ms. Gosselin alleged that, by reducing benefits for those under-30 far below the minimum the Québec government itself had determined was required to meet an individual’s basic needs, the Regulation infringed the physical, psychological and social security of the person of young welfare recipients in a manner not in accordance with the principles of fundamental justice.^37 Ms. Gosselin rejected the province’s argument that the availability of on-the-job training, community work and remedial education programs justified the Regulation under s. 1 of the Charter, countering that, even accepting the validity of the government’s objectives,^38 the regime was not a rational,^39 minimal,^40 or proportionate^41 impairment of young welfare recipients’ equality or security of the person rights. She asked the court to declare the Regulation was unconstitutional and to order the government to reimburse claimants the benefits they were denied during the relevant period, totalling roughly $389 million.^42

(b) The Lower Court Rulings in Gosselin

In his 1992 Québec Superior Court decision, Justice Reeves concluded that Louise Gosselin’s evidence was insufficient to support her Charter claim.^43 Justice Reeves took issue with the fact that Ms. Gosselin was the only witness on behalf of the entire class of welfare recipients affected by the reduced rate, and he accepted the government’s characterization of the expert reports and evidence submitted in relation to the circumstances of other young welfare recipients as hearsay.^44 Justice Reeves also criticized the lack of evidence about the comparative situation of recipients over the age of 30, who received the full basic needs amount.^45 In terms of Ms. Gosselin’s substantive arguments, Justice Reeves found that the s. 7 right to life, liberty and security of the person did not include a positive right to social assistance from the state.^46 He also held that the Regulation was not discriminatory under s. 15 of the Charter, since recipients could obtain parity of benefits by participating in the available education and job training programs, and because the differential regime reflected the actual

^36 Gosselin (SCC), supra note 5 (Factum of the Appellant at para. 50) [author’s translation: “The social assistance system is the final recourse for persons in need. To be eligible for welfare benefits, a person must be totally without means. It is not by choice that such persons turn to the State, but from absolute necessity.”].
^37 Ibid. (Factum of the Appellant at paras. 53-54).
^38 Ibid. at paras. 98-99.
^39 Ibid. at paras. 100-121.
^40 Ibid. at paras. 122-144.
^41 Ibid. at paras. 145-159.
^42 Ibid. at para. 221; Gosselin (SCC), supra note 5 at para. 9.
^43 Gosselin (SC), supra note 5 at 1664.
^44 Ibid.
^45 Ibid.
^46 Ibid. at 1669.
characteristics of the targeted group and was designed to promote the beneficial objective of encouraging young welfare recipients to become financially independent.47

In 1999, the Québec Court of Appeal dismissed Louise Gosselin’s appeal. Justices Mailhot, Baudouin and Robert agreed with Justice Reeves that Louise Gosselin’s claim to an adequate level of assistance involved an economic right that was not included in s. 7.48 With regard to Ms. Gosselin’s s. 15 argument, Justice Mailhot decided that the differential regime, taken as a whole, did not have a disadvantageous impact on young welfare recipients.49 Justice Baudouin found that the Regulation discriminated based on age, but was saved by s. 1.50 Justice Robert also found the reduced rate was age-discriminatory.51 But, contrary to Justice Baudouin, he concluded the Regulation could not be justified under s. 1 of the Charter, since the purported benefit of inciting young people to move off social assistance did not outweigh the severe negative effects of the regime.52

(c) The Supreme Court of Canada’s Judgment in Gosselin

In her 2002 judgment for the majority of the Supreme Court, Chief Justice McLachlin, joined by Justices Gonthier, Iacobucci, Major and Binnie, upheld the lower and appeal court rulings on the constitutionality of the Regulation and dismissed Louise Gosselin’s appeal.53 The Chief Justice rejected Ms. Gosselin’s argument that the reduced benefit amount for those under-30 violated s. 15 of the Canadian Charter, on the grounds that the differential regime was designed to enhance the dignity of young welfare recipients.54 In her view: “The age-base

47 Ibid. at 1681. Justice Reeves dismissed Louise Gosselin’s claim under the Québec Charter on the grounds that s. 45 is a statement of policy that provides no authority for the courts to review the adequacy of social measures the legislature chooses to adopt; ibid. at 1667.
48 Gosselin (CA), supra note 5 at 1042-43.
49 Ibid. at 1042.
50 Ibid. at 1047.
51 Ibid. at 1061.
52 Ibid. at 1089. Justice Robert further determined the Regulation violated s. 45 of the Québec Charter. However he found that, in accordance with the remedial and anti-derogation provisions set out under ss. 49 and 52 the Charter, s. 45’s guarantee of financial assistance “susceptible of ensuring ... an acceptable standard of living” was not judicially enforceable: ibid. at 1119. See generally, Robitaille, Droits économiques et sociaux, supra note 21 at 197-208.
53 Gosselin (SCC), supra note 5, para. 5. The majority of the court also rejected Louise Gosselin’s claim under the Québec Charter concluding, at para. 88, that while s. 45 required the government to provide social assistance, it placed the adequacy of the particular measures adopted beyond judicial review.
54 Ibid., at para. 66. For a critique of this aspect of the decision see: Dianne Pothier, “But it’s for Your Own Good” in Margot Young et al eds, Poverty: Rights, Social Citizenship and Legal Activism (Vancouver: UBC Press, 2007) 40 [Young et al, Poverty: Rights]; Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal
distinction was made for an ameliorative, non-discriminatory purpose and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.\textsuperscript{55} The Chief Justice also rejected Ms. Gosselin’s s. 7 claim. On the broader question of whether “the right to a level of assistance sufficient to meet basic needs”\textsuperscript{56} fell within s. 7, she opined that: “One day s. 7 may be interpreted to include positive obligations.”\textsuperscript{57} However, upholding Justice Reeves’ decision at trial, the Chief Justice found there was insufficient evidence to support such a claim in Louise Gosselin’s case.\textsuperscript{58}

In contrast to the majority, Justices Bastarache, LeBel, Arbour and L’Heureux-Dubé agreed with Ms. Gosselin that the Regulation contravened the Charter’s equality guarantee.\textsuperscript{59} Justice L’Heureux-Dubé summarized the s. 15 violation: “As a result of s. 29(a), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income.”\textsuperscript{60} The dissenting justices further found that this rights violation could not be justified under s. 1 of the Charter.\textsuperscript{61} In Justice Bastarache’s analysis: “In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation.”\textsuperscript{62}

In her dissenting judgment, concurred in by Justice L’Heureux-Dubé, Justice Arbour also accepted Louise Gosselin’s argument that the Regulation violated s. 7 of the Charter.\textsuperscript{63} Justice Arbour pointed to the physical and psychological health risks flowing directly from living conditions under the reduced rate: inability to pay for adequate clothing, electricity, hot water or shelter,\textsuperscript{64}

\textsuperscript{55} Gosselin (SCC), ibid. at para. 70.
\textsuperscript{56} Ibid. at para. 76.
\textsuperscript{57} Ibid. at para. 82.
\textsuperscript{58} Ibid. at para. 83.
\textsuperscript{59} Ibid. at para. 134, per L’Heureux-Dubé J. para. 258, per Bastarache J. para. 395 per Arbour J. para. 413, per LeBel J.
\textsuperscript{60} Ibid. at para. 130.
\textsuperscript{61} Ibid. at para. 140 per l’Heureux-Dubé J. para. 290, per Bastarache J. para. 394, per Arbour J. para. 413, per LeBel J.
\textsuperscript{62} Ibid. at para. 290.
\textsuperscript{63} Ibid. at para. 385.
\textsuperscript{64} Ibid. at para. 373.
malnourishment, a "spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction"; and a heightened risk of suicide. She noted that these effects were experienced by Louise Gosselin herself and, as the expert evidence documented, by other young welfare recipients subject to the Regulation. As for the possibility of justifying the Regulation under s. 1 of the Charter, Justice Arbour averred: "it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so."

3. ONE STEP FORWARD: POSITIVE OBLIGATIONS UNDER S. 7 OF THE CHARTER

(a) Interpretive Context and Expectations

Canada was an active participant in the international post-war movement towards more expansive and effective human rights protection, especially for members of historically disadvantaged groups — the backdrop against which the Canadian Charter was proposed, negotiated and ultimately adopted. Beginning with its endorsement of the Universal Declaration of Human Rights in 1948, Canada undertook substantial socio-economic rights commitments culminating in the International Covenant on Economic Social and Cultural Rights (ICESCR) which, with the International Covenant on Civil and Political Rights (ICCPR), was ratified by Canada in 1976 with the consent of the

65 Ibid. at paras. 374-375.
66 Ibid. at para. 332.
67 Ibid. at para. 371.
68 Ibid. at para. 394.
69 GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) [UN Declaration]. In particular, Article 25(1) of the UN Declaration affirms that: "Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
70 International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force January 3, 1976, accession by Canada May 19, 1976) [ICESCR]. Of direct relevance in the Gosselin case, article 9 of the ICESCR guarantees the right to social security and social insurance; article 11, the right to an adequate standard of living, including adequate food, clothing and housing; and article 12, the right to the highest attainable standard of physical and mental health.
71 International Covenant on Civil and Political Rights, December 19, 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force March 23, 1976, accession by Canada May 19, 1976) [ICCPR]. In tandem with the ICESCR, the ICCPR abandons the outmoded distinction between positive and negative rights. As the preambles of both Covenants affirm: "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy . . . economic, social and
provinces and shortly before the Trudeau government launched the constitutional reform process that culminated in the enactment of Constitution Act, 1982 and the Charter. In particular, article 11(1) of the ICESCR affirms that: “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right.” In ratifying the ICESCR, Canada formally acknowledged that adequate food, housing, health care, education and social security were not simply desirable social policy objectives but were basic human rights, requiring progressive realization “to the maximum of available resources” and effective remedies when governments failed to meet their obligations. There was a shared expectation within the human rights community that these international undertakings would inform the interpretation and application of the Charter. As the Supreme Court of Canada has repeatedly affirmed: “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in the international human rights documents which Canada has ratified.”


Emerging domestic rights-based approaches to social justice also fed into debates about the language and content of the new constitutional guarantees. United in their criticism of the courts' negative and circumscribed reading of the Canadian Bill of Rights, women's, disability and other equality seeking groups mobilized in support of a new rights paradigm — one that would see the Charter and Canadian courts directly engage with government obligations to institute programs and benefits to address historic patterns of exclusion and disadvantage. Building on Canada's international obligations and drawing on remedial jurisprudence under provincial and federal human rights legislation, it was expected that access to housing, health care, food, jobs, child care and social assistance for those in need would be accorded as much importance as negative guarantees against unreasonable government interference with life, liberty, security of the person and other individual rights. Francine Fournier explained: “Face à la discrimination individuelle et systémique, des recours existent ou sont possibles. Ils doivent être développés, raffinés et renforcés. Mais ces interventions doivent aller de pair avec la reconnaissance concrète des droits économiques et sociaux. L'égalité réelle exige le développement de ceux-ci.”

Feminist constitutional lawyers and scholars, including Marilou McPhedran, Mary Eberts, Tamra Thomson and Beverley Baines, were articulate proponents of this understanding of the Charter, working successfully with women's and other equality seeking organizations to reframe it, in particular, to require affirmative measures to address socio-economic marginalization and remedy disadvantage. As Mary Eberts described it: “Full substantive equality . . . was the groups' goal.” The expectation the Charter would require positive action by

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76 S.C. 1960, c. 44.


governments to ensure the substantive benefit and equal enjoyment of Charter rights, especially for members of historically disadvantaged communities, was shared beyond the nascent feminist legal academy. In a 1982 review of the newly enacted Charter, Rod Macdonald dismissed the idea that the Charter entrenched a purely negative concept of freedom. In an echo of Frank R. Scott, Macdonald argued that "the most fundamental right for the majority of Canadians in not a right to be free from certain kinds of governmental activity, but rather the right to be free to benefit equally from the advantages that organized government fosters."

In his 1983 analysis of s. 7 of the Charter, John Whyte likewise argued against a narrow interpretation of s. 7 that would offer safeguards only against negative state action, or that would restrict constitutionally protected life, liberty and security of the persons' interests to those at risk in the criminal justice system. In proposing a substantive understanding of the principles of fundamental justice, Whyte observed that: "It is now commonplace to think of the state's imposition of burdens and benefits (relating to, among other things, life, liberty and security of the person) as either promoting social justice or, on the contrary, as being fundamentally unjust." In terms of the range of interests protected under s. 7, Whyte contended:

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As Scott himself argued: "to allow the still unresolved problems of our economic system to deprive [people of . . . essentials to the good life] without taking steps to alleviate the deprivations, is to take away human rights."); Frank R. Scott, “Expanding Concepts of Human Rights" in Essays on the Constitution (Toronto: University of Toronto Press, 1977) 353 at 357.

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Ibid. at 28.
Assuming that the *Charter* is dedicated to granting rights over matters of fundamental importance, "security of the person" will include conditions necessary for life, such as food and shelter. Hence governmental actions which take away shelter and food, (or the capacity to obtain shelter and food), would be subject to court review under section 7.\(^5\)

(b) The Argument Against S. 7 as a Source of Positive Obligations

It is, however, Peter Hogg's contrary view of s. 7\(^6\) that was largely embraced by Canadian courts called upon to decide early *Charter* claims brought by people living in poverty.\(^7\) Although s. 32 states that the *Charter* applies "in respect of all matters within the authority of" federal and provincial governments,\(^8\) Hogg affirmed that: "Section 7, like all the other *Charter* rights, applies only to 'governmental action', as defined in s. 32 of the *Charter*."\(^9\) Acknowledging that: "It has been suggested that 'security of the person' includes the economic capacity to satisfy basic human needs,"\(^10\) Hogg warned that: "The trouble with

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\(^{5}\) *Ibid.* at 40.

\(^{6}\) Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 44.5 [Hogg, *Constitutional Law*].


\(^{8}\) *Charter*, supra note 2, s. 32(1). The argument that s. 32(1) demands government action was rejected by the Supreme Court in *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211. [1998] 1 S.C.R. 493 (S.C.C.). Citing Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 Constitutional Forum 113 at 115, Justice Cory stated, at para. 60:

The relevant subsection, s. 32(1) (b), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority." The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.


\(^{9}\) Hogg, *Constitutional Law*, supra note 86 at 44.5.
ONE STEP FORWARD AND TWO STEPS BACK

This argument is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the Charter." In Hogg's opinion:

The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all the elements of the modern welfare state, including . . . of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and s. 7 does not provide that clear mandate.  

In Gosselin, the Attorney General of Québec repeatedly cited Peter Hogg in arguing that s. 7 of the Charter applies only to government action that directly threatens an individual’s physical and psychological integrity; that it excludes socio-economic rights; and that it imposes no positive obligations on governments. Referencing Hogg's analysis, Québec insisted that the Charter does not permit judicial review of publicly funded social policies and that the principle of Parliamentary sovereignty continued to apply in this area. It concluded: "L'État n'a donc aucune obligation constitutionnelle d'adopter des mesures pour promouvoir ou assurer la sécurité des personnes."  

In its intervention before the Supreme Court in Gosselin, the Attorney General of Ontario likewise maintained that "section 7 exists to constrain government action rather than to impose an obligation on the government to provide a minimum guaranteed income" and it invoked Hogg's warning about the wide array of social programs in the areas of housing, health care, utilities, food, and others, that would become subject to judicial review if s. 7 were read to include positive obligations. Pointing out that "the courts have consistently ruled that . . . section 7 does not impose positive legal obligations on governments", Ontario averred that "section 7 is restricted to the protection of individuals from direct state interference with physical and psychological integrity.

90 Ibid. at 44.8.
91 Ibid.
92 Ibid.
93 Gosselin (SCC), supra note 5 (Factum of the Respondent at para. 198).
94 Ibid. at para. 208.
96 Ibid. at para. 220.
97 Ibid. at para. 211 [author's translation: "The State therefore has no constitutional obligation to adopt measures to promote or guarantee the security of persons."]
99 Ibid. at para. 46.
100 Ibid. at para. 58.
101 Ibid.
(c) The Supreme Court's Ruling on Positive Obligations in Gosselin

This narrow reading of s. 7 was rejected by eight of the nine Supreme Court justices in Gosselin. Only Justice Bastarache took the position that “a s. 7 claim must arise as a determinative state action that in and of itself deprives the claimant of the right to life, liberty and security of the person.”102 Justice Bastarache maintained that Louise Gosselin’s s. 7 claim could not succeed because the threat to her security of the person “was brought upon her by the vagaries of a weak economy not by the legislature’s decision not to accord her more financial assistance.”103 He concluded that any harm caused by the under-inclusive nature of the welfare regime could be successfully challenged only under s. 15.104

While agreeing with his finding that the impugned Regulation violated Louise Gosselin’s s. 15 rights,105 Justice LeBel disagreed with Justice Bastarache’s “interpretation and application” of s. 7.106 Chief Justice McLachlin, with the concurrence of Justices Gonthier, Iacobucci, Major and Binnie, also rejected Justice Bastarache’s argument that s. 7 could not apply absent state action.107 The Chief Justice noted that s. 7 had so far been interpreted by the Supreme Court as a negative guarantee restricting the state from depriving people of life, liberty or security of the person.108 However she affirmed that “One day section 7 may be interpreted to included positive obligations.” Referring to Lord Sankey’s “living tree” metaphor,109 and to Justice LeBel’s caution in Blencoe v. Edwards v. Canada (Attorney General), 1929 CarswellNat 2, [1930] A.C. 124 (Jud. Com. of Privy Coun.) at 136.

102 Ibid., at para. 213. Justice Bastarache’s narrow reading of s. 7 in Gosselin was particularly disappointing in light of his Court of Appeal dissent, subsequently adopted by the Supreme Court of Canada, in New Brunswick (Minister of Health & Community Services) v. G. (J.), 1997 CarswellNB 145, 187 N.B.R. (2d) 81 (N.B. C.A.), reversed 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46 (S.C.C.). In that case, Justice Bastarache concluded that the New Brunswick government had a positive obligation to provide legal aid to a sole support mother on social assistance who was at risk of losing custody of her children, and who couldn’t afford a lawyer to represent her. Referencing John Whyte’s s. 7 analysis, supra note 83, Justice Bastarache observed, at p. 12:

In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action... It is also important to look at individual international instruments... for instance, section 25 of the Universal Declaration of Human Rights... speaks of “the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one’s] control” (my emphasis). The Charter must limit the intrusion of the state in the lives of its citizens; it must also mandate its function in those limited cases where individuals can make legitimate claims against it in the name of liberty and human dignity.

103 Gosselin (SCC), ibid., at para. 217.

104 Ibid. at para. 223.

105 Ibid. at para. 401.

106 Ibid. at para. 82.

107 Ibid.

108 Ibid. at para. 81.

109 Ibid. at para. 81.
British Columbia (Human Rights Commission)\(^{110}\) “that it would be dangerous to freeze the development” of s. 7\(^{111}\), the Chief Justice concluded:

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards . . . I leave open the possibility that a positive obligation to sustain life, liberty or security of the person may be made out in special circumstances. However, this is not such a case.\(^{112}\)

Justices Arbour and L’Heureux-Dubé not only rejected the narrow reading of s. 7 put forward by the province and adopted by Justice Bastarache and the trial and Court of Appeal, they further held that Louise Gosselin’s s. 7 rights were violated by the gross inadequacy of the welfare benefits provided by the Regulation. In contrast to the Chief Justice’s focus on previous jurisprudence, Justice Arbour argued:

There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed, but rarely examined . . . We must not sidestep a determination of this issue by assuming from the start that s. 7 includes a requirement of affirmative state action. That would be to beg the very question that needs answering.\(^{113}\)

Justice Arbour underscored the need to “deconstruct the various firewalls that are said to exist around s. 7”,\(^{114}\) starting with the premise that the exclusion of property rights from s. 7 was determinative of Louise Gosselin’s claim.\(^{115}\) Referring to the distinction drawn by Chief Justice Dickson in Irwin Toy,\(^{116}\) between “corporate-commercial economic rights” and “economic rights fundamental to human life or survival”, Justice Arbour argued that: “the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence ‘security of the person’) — and, at the limit, even of one’s survival (and hence ‘life’) — that . . . it is a gross mischaracterization to attach to them the label of ‘economic rights’.\(^{117}\)

Justice Arbour contested the proposition that s. 7 rights “cannot be implicated absent any positive state action”\(^{118}\) as contradicted by the language of

\(^{111}\) Gosselin (SCC), supra note 5 at para. 82.
\(^{112}\) Ibid. at paras. 82-83.
\(^{113}\) Ibid. at para. 319.
\(^{114}\) Ibid. at para. 309.
\(^{115}\) Ibid. at para. 311.
\(^{116}\) Supra note 1.
\(^{117}\) Gosselin (SCC), supra note 5 at para. 312.
s. 7 itself, as well as by Supreme Court jurisprudence, including the court’s decision in New Brunswick (Minister of Health & Community Services) v. G. (J.) in which Chief Justice Lamer imposed a positive obligation on the provincial government to provide state funded legal counsel to a mother in receipt of social assistance in a child protection proceeding. Justice Arbour further questioned “the general assertion that positive claims against the state for the provision of certain needs are not justiciable” because deciding them would, in Peter Hogg’s words, “bring under judicial scrutiny all of the elements of the modern welfare state”, something the courts are not competent to do. Justice Arbour countered that: “While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case.” Justice Arbour concluded that “any acceptable approach to Charter interpretation — be it textual, contextual or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but necessary.

In summary, eight of nine Supreme Court justices in the Gosselin case rejected the argument that s. 7 could not be invoked absent direct state action and could not be applied to impose positive obligations on governments to protect, life, liberty and security of the person. While a majority of the court upheld Justice Reeves’ finding that the evidentiary record was insufficient to support Louise Gosselin’s challenge, the court explicitly left open the possibility that s. 7 could be read to include socio-economic rights. Justices Arbour and L’Heureux-Dubé held not only that s. 7 provided a sound doctrinal basis for Louise Gosselin’s claim, but that the reduced benefits for those under-30 violated their Charter rights to security of the person. Chief Justice McLachlin ruled that the circumstances in which s. 7 would be applied as the basis for an affirmative government obligation to guarantee adequate living standards remained to be decided in a future case. This aspect of the Gosselin decision represented a step forward for the Charter rights of people living in poverty.

4. TWO STEPS BACK: THE COURT’S APPROACH TO LOUISE GOSSELIN’S SECTION 7 CLAIM

The Supreme Court’s rejection of the narrow reading of s. 7 that prevailed in Peter Hogg’s and other scholarly commentary, in government submissions.

118 ibid. at para. 319.
119 ibid. at paras. 321-325.
120 Supra note 102.
121 Gosselin (SCC), supra note 5 at paras. 330-331 citing Hogg, Constitutional Law of Canada, supra note 86.
122 Gosselin (SCC), ibid. at para. 332.
123 ibid. at para. 335.
and in Canadian lower court jurisprudence up to that point, was a positive development for the advancement of poor people's Charter rights. As outlined below, however, the majority's uncritical and stereotype-infused approach to the evidence, and the way in which the majority of the court reframed and then dismissed Louise Gosselin's s. 7 claim, were equally significant set-backs for the constitutional inclusion of people living in poverty.

(a) The Court's Approach to the Evidence

At trial Justice Reeves concluded there was insufficient evidence to support Louise Gosselin's Charter challenge. He characterized the expert evidence she adduced as hearsay and he found that her personal testimony was insufficient to support her claim on behalf of all other young welfare recipients adversely affected by the Regulation. In his view:

On ne peut considérer comme vrais les faits sur lesquels les experts ont fondé leurs conclusions et formulé leurs généralisations. Il est donc fort douteux que la demanderesse représentante, agissant pour le compte de quelque 75 000 individus, ait déchargé le fardeau de la preuve quant à savoir si l'application de la loi a produit à leur égard des effets défavorables.

At the same time, Justice Reeves' appraisal of Louise Gosselin's evidence and substantive argument was rife with prejudicial stereotypes about the nature and causes of poverty and about people living in poverty as individuals and as a group.

In particular, Justice Reeves maintained that while poverty could in some cases be attributed to external factors beyond individual control, most poverty was the result of "intrinsic" characteristics of the poor. Justice Reeves explained: "Les études démontrent que la majorité des pauvres le sont pour des raisons intrinsèques. Il s'agit de personnes sous-scolarisées ou psychologiquement vulnérables, ou chez qui l'éthique du travail n'est guère favorisée." He argued further: "En effet, il est constant que l'être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et


125 Gosselin (SC), ibid. [author's translation: "We cannot assume the facts upon which the experts based their conclusions and formulated their generalizations to be true. It is thus highly doubtful that the representative plaintiff, acting on behalf of some 75,000 individuals, has discharged the burden of proof as to the negative effects the application of the law had upon them."].

126 Ibid. at 1670.

127 Ibid. at 1676 [author's translation: "Studies show that the majority of the poor are poor for intrinsic reasons. They are persons who are under-educated or psychologically vulnerable, or who have a weak work ethic."].
maitrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l'entraîner dans la pauvreté matérielle." As an illustration, Justice Reeves pointed to the high incidence of respiratory illnesses among people living in poverty, coupled with the fact that the most economically disadvantaged were twice as likely to smoke, notwithstanding the high cost of cigarettes.129 This, he asserted, demonstrated that any financial assistance provided to the poor, including to young welfare recipients, had to be conditional:

Pourquoi le pauvre affecte-t-il une part importante de son maigre budget au tabac (et à l'alcool)? Il s'agit évidemment d'usage de drogues bénignes qui soulagent sa détresse psychologique. La conclusion s'impose : l'assistance pécuniaire doit s'accompagner d'éducation et d'encouragement à délaisser les habitudes coûteuses et nocives. C'est la philosophie qui inspire les programmes offerts aux 18 à 30 ans qui désirent obtenir la parité.130

Instead of censuring Justice Reeves' reliance on these discriminatory stereotypes, Chief Justice McLachlin expressed full agreement with his ruling on the insufficiency of Louise Gosselin’s evidence. In her words: "the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect . . . I can find no basis upon which this Court can set aside this finding."131 With regard to Louise Gosselin’s s. 7 claim in particular, the Chief Justice was unequivocal. Making virtually no reference either to the expert evidence, or to Louise Gosselin’s own testimony about the multiple harms to the lives and security of young welfare recipients caused by the Regulation, she concluded: "The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support."132

Conversely, even in the absence of any supporting evidence, Chief Justice McLachlin was unqualified in her acceptance of the government’s claims in defence of the impugned Regulation — claims that reflected and perpetuated equally prejudicial stereotypes about poverty and young welfare recipients. In particular, although the government failed to provide any concrete evidence of

128 Ibid. at 1676 [author's translation: "In fact, it is a given that a human being who has developed the qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychological and even physical obstacles that could lead them into material poverty"].

129 Ibid. at 1677.

130 Ibid. [author's translation: "Why does a poor person devote a large portion of his meagre budget to tobacco (and to alcohol)? This is obviously the use of benign drugs to relieve psychological distress. The conclusion is unavoidable: financial assistance must be combined with education and encouragement to abandon costly and harmful habits. This is the philosophy that underlies the programs offered to those aged 18 to 30 who wish to achieve parity of benefits."].

131 Gosselin (SCC), supra note 5 at paras. 46-47.

132 Ibid. at paras. 82-83.
the Regulation's benefits or effectiveness in promoting the integration of young welfare recipients into the workforce or broader society, the Chief Justice accepted that: "notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30... the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance." Chief Justice McLachlin likewise approved the province's unsubstantiated claim that, left to their own devices, young people would develop long-term dependence on government assistance, and therefore had to be forced off welfare for their own good. In her view: "Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment." She stressed that "reliance on welfare can contribute to a vicious circle" and charged that: "opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives."

Chief Justice McLachlin also accepted the Québec government's argument that difficulties facing young welfare recipients were owing not to the government's actions, but to personal circumstances and individual choice. Although, as Justice Bastarache detailed in his s. 15 dissent, there were numerous barriers to accessing the remedial education and job training programs, the Chief Justice affirmed: "there is no evidence in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment." As for Louise Gosselin herself, the Chief Justice concluded that she "ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits" rather than because of any flaws in the programs themselves. The Chief Justice's inattention to, if not callous disregard for, the actual experience of the claimants, exhaustively documented in the expert and Louise Gosselin's own evidence, produced a decision completely out of touch with the reality of the impugned regime and young welfare recipients' lives.

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133 Ibid. at para. 66.
134 Ibid. at para. 43.
135 Ibid.
136 Ibid.
137 Ibid. at paras. 158-163; 276-285.
138 Ibid. (Factum of the Appellant at paras. 114-128).
139 Ibid. at para. 47.
140 Ibid. at paras. 8, 48.
Unfiltered by stereotypes or preconceptions about the respective motivations of governments and those seeking financial assistance, the dissenting justices’ more critical appraisal of the evidence led them to very different conclusions. Having earlier referred to the multiple ways in which the inadequate benefits threatened the physical and mental health and security of young welfare recipients, Justice Arbour underlined the challenge of job hunting for those who could not afford a telephone, suitable clothes or transportation and the reality that “inadequate food and shelter interfere with the capacity both for learning as well as for work itself.” As she observed: “the long-term importance of continuing education and integration into the workforce is undermined when those at whom such ‘help’ is directed cannot meet their basic short-term subsistence requirements.” In terms of the efficacy of the remedial education and job training programs, Justice Arbour was succinct: “The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised.”

For his part, pointing to the weight of expert evidence relating to youth unemployment in Québec in the mid-eighties, Justice LeBel asserted: “Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available.” Justice LeBel observed that the province had offered no evidence that young welfare recipients would not have participated in the education and job training programs without the financial incentive created by the differential regime. In his view: “the Québec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits.”

(b) The Framing of Louise Gosselin’s S. 7 Claim

Like the Chief Justice’s approach to the evidence in Gosselin, the manner in which her majority judgment framed Louise Gosselin’s s. 7 claim proved highly problematic not only for the success Ms. Gosselin’s argument, but in subsequent poverty-related Charter cases. What Ms. Gosselin asked the court to decide was whether, by reducing the under-30 welfare rate to a level that made recipients sick, homeless, hungry and even suicidal, the Québec government had violated their s. 7 rights to security of the person. What the majority did, however, was to

142 Gosselin (SCC), supra note 5 at paras. 373-377.
143 Ibid. at para. 392.
144 Ibid.
145 Ibid. at para. 371.
146 Ibid. at para. 409.
147 Ibid. at para. 410.
transform her challenge to the Regulation into a far more abstract and sweeping claim. As the Chief Justice put it, Ms. Gosselin was seeking "a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards" — one that, in her view, the evidence failed to support. Instead of examining the actual impact of the impugned Regulation on the physical and psychological security and integrity of those affected — the issue that was the primary focus of Louise Gosselin's exhaustive personal and expert evidence — the Chief Justice failed even to acknowledge those egregious harms. Instead, the starting point for her analysis became a different question: whether, in the absence of any state action, s. 7 guaranteed a right to adequate welfare. Framed in this way, Louise Gosselin faced what became an insurmountable doctrinal and evidentiary burden.

Again, the difference between the majority and dissenting justices' analyses of Louise Gosselin's claim is striking. From Justice Arbour's perspective, there was no doubt that the reduction in the basic needs benefit imposed by the Regulation seriously infringed the physical integrity and security of those affected: "First, there are the health risks that flow directly from the dismal living conditions that $170/month afford ... Second, the malnourishment and undernourishment of young welfare recipients also result in a plethora of health problems." The deprivation of psychological security of the person caused by the Regulation was, in Justice Arbour's view, equally devastating: "isolation, depression, humiliation, low self-esteem, stress and drug addiction." As Justice Arbour summarized it: "this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well."

Justice l'Heureux-Dubé concurred with Justice Arbour's analysis. In her view:

There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.

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148 Ibid. at paras. 82-83.
149 Ibid. at para. 76.
150 Ibid. at paras. 373-375.
151 Ibid. at para. 376.
152 Ibid. at para. 377.
153 Ibid., at para. 141.
154 Ibid. at para. 130.
Instead of ruling on Louise Gosselin’s s. 7 claim in the abstract, Justices Arbour and L’Heureux-Dubé looked to the actual evidence of the impact of the Regulation on young welfare recipients’ physical and psychological health and security. Assessed in light of the real-life consequences of the Regulation, rather than against a preconceived doctrinal backdrop, Justices Arbour and L’Heureux-Dubé found it impossible to see the government’s decision to provide a grossly inadequate level of benefits to those under the age of 30 as anything but unconstitutional.

5. THE LEGACY OF GOSSELIN

In principle, the Supreme Court’s rejection of the narrow interpretation of s. 7 that prevailed prior to Gosselin was a significant step forward for the Charter rights of people living in poverty. In reality, in the 15 years since the decision in Gosselin, lower and appellate courts have invoked the majority’s ruling to further buttress the argument that s. 7 does not protect socio-economic rights or require governments to take affirmative steps to protect life, liberty or security of the person. Charter claimants in poverty-related cases have continued to confront adverse stereotypes and more onerous evidentiary burdens than government defendants. In many cases, the serious harms to life and security of the person they have painstakingly documented in their own testimony, and through expert evidence, have been discounted or even ignored. And, like in Gosselin, the s. 7


Much of the affidavit material filed by the defendants consists of complaints about the general thrust of current provincial social policy in Ontario; the affiants all have an obvious socio-economic and political perspective that is diametrically opposed to that of the government of the day. It is, however, frankly difficult to discern how the legislation in question in itself can be said to have a prejudicial effect on their ‘essential human dignity’ by placing restrictions on the place and manner of solicitation.

Babe J was even more emphatic in relation to the claimants’ evidence in support of their s. 2 argument, stating at 409 that: “I find assertions by affiants and authors relied upon by the defence to the contrary unconvincing; it may be that they consider the presence of aggressive beggars in the streets conducive to the advancement of their own socio-political points of view, but there is no evidence at all that the defendants themselves or others like them are intending to make a political point by soliciting for funds.”

156 See for example Toussaint v. Canada (Attorney General), 2011 FCA 213, 2011 CarswellNat 3685, 2011 CarswellNat 6061 (F.C.A.) at para. 113, leave to appeal refused 2012 CarswellNat 943, 2012 CarswellNat 944 (S.C.C.)[Toussaint (FCA)], where Justice Stratus ignored the expert evidence to the contrary and rejected a Charter challenge to the denial of federal health coverage to an undocumented migrant, on the grounds that: “If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada’s immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could
claims of people living in poverty continue to be reframed in a way that reflects and reinforces the discriminatory and outdated positive versus negative rights paradigm that the Charter was expected to overcome. Instead of examining the actual impact of governments’ actions and inaction on claimants’ lives and physical and psychological health and security, lower courts are, like in Gosselin, characterizing the Charter claims of people living in poverty as broad and presumptively non-justiciable demands for free standing rights to welfare, housing or health care, and dismissing them on that basis.

(a) The Tanudjaja Case


Jennifer Tanudjaja, and three other individuals who were homeless or had experienced homelessness. The Application relied on an extensive evidentiary record compiled over a two-year period showing that the cumulative effect of the Canadian and Ontario governments’ affordable housing, income support and accessible housing policies was widespread homelessness, disproportionately affecting Indigenous and racialized people, people with disabilities, newcomers, seniors, social assistance recipients, and youth. The evidence in Tanudjaja also documented the severe physical, psychological and social consequences of homelessness and housing insecurity for those affected.

Based on that evidence, in May 2010, the Applicants filed a Notice of Application in the Ontario Superior Court, arguing that the Ontario and Canadian governments’ failure to implement strategies to reduce and eliminate homelessness violated ss. 7 and 15 of the Charter and could not be justified under s. 1. The Applicants requested a declaration to that effect, and they asked the court to order the federal and Ontario governments to design and implement national and provincial strategies to reduce and eliminate homelessness as an

the Tanudjaja case can be found at: http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homelessness-motion-to-strike.html.

CERA is a non-profit organization providing services to low income tenants and the homeless in Ontario; see <http://www.equalityrights.org/cera/>. The Application was supported by a number of interveners working in coalition, including the Charter Committee on Poverty Issues, Pivot Legal Society, Justice for Girls, the Income Security Advocacy Centre, Amnesty International, the International Network for Economic, Social and Cultural Rights (ESCR-Net), the David Asper Centre for Constitutional Rights, and (at the Ontario Court of Appeal) the Ontario Human Rights Commission, the ODSP Action Coalition, the Steering Committee on Social Assistance, the Colour of Poverty/Colour of Change Network, the ARCH Disability Law Centre, the Dream Team, the Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic and the Women’s Legal Education and Action Fund (LEAF). The author, with Jackie Esmonde at the Ontario Superior Court and Benjamin Ries at the Court of Appeal, represented the Charter Committee Coalition.

Jennifer Tanudjaja, a young single mother in receipt of social assistance, was living with her two sons in an apartment that cost more than her total monthly social assistance benefit, and had been on a waiting list for subsidized housing for over two years. Diagnosed with cancer, Brian DuBourdieu was unable to work or to pay his rent and lost his apartment, living on the streets and in shelters, and on a waiting list for subsidized housing for four years. Ansar Mahmood, severely disabled in an industrial accident, lived with his wife and four children including one son confined to a wheelchair, in a two-bedroom apartment that was not accessible. He and his family had been on a waiting list for subsidized accessible housing for four years. Following the sudden death of her spouse, Janice Arsenault became homeless, living in shelters and on the streets for several years and forced to place her young two sons in her parents’ care, until she was able to find rental housing that consumed two-thirds of her limited monthly income, putting her at constant risk of becoming homeless again.

Tanudjaja (SC), supra note 158 (Amended Notice of Application at paras. 1-5); Tanudjaja (SC), ibid (Factum of the Applicants (Respondents on the Motion) at para. 8); Tanudjaja (SC), ibid paras. 12-14. Jennifer Tanudjaja, a young single mother in receipt of social assistance, was living with her two sons in an apartment that cost more than her total monthly social assistance benefit, and had been on a waiting list for subsidized housing for over two years. Diagnosed with cancer, Brian DuBourdieu was unable to work or to pay his rent and lost his apartment, living on the streets and in shelters, and on a waiting list for subsidized housing for four years. Ansar Mahmood, severely disabled in an industrial accident, lived with his wife and four children including one son confined to a wheelchair, in a two-bedroom apartment that was not accessible. He and his family had been on a waiting list for subsidized accessible housing for four years. Following the sudden death of her spouse, Janice Arsenault became homeless, living in shelters and on the streets for several years and forced to place her young two sons in her parents’ care, until she was able to find rental housing that consumed two-thirds of her limited monthly income, putting her at constant risk of becoming homeless again.

Tanudjaja (SC) (Amended Notice of Application at paras. 27-32), ibid.; Tanudjaja (SC) (Factum of the Applicants (Respondents on the Motion) at paras. 15-18), ibid.
appropriate remedy under s. 24(1) of the Charter. With regards to s. 7 in particular, the Tamuljaja Application did not contend that the provision of housing or housing subsidies was constitutionally guaranteed. Nor did the Applicants demand the governments be ordered to provide a particular “economic” benefit. Rather they argued that Ontario and federal government policies and decisions had created and sustained conditions of homelessness and inadequate housing, and that both governments had consistently refused to implement a coherent strategy to address this situation. The Applicants alleged that the governments’ actions and inaction together resulted in serious harm to life and to security of the person of those directly affected, including physical and mental illness, shortened lives and even death — interests the courts had previously recognized as falling directly within the ambit of s. 7.

In May 2012, two years after the Notice of Application was filed and six months after the full record was served, the Ontario and Canadian governments brought a motion to strike the Tamuljaja claim for disclosing no reasonable cause of action. In support of that motion, the Attorney General of Ontario argued that the Application was “in effect an effort to constitutionalize a right to housing.” Citing Peter Hogg as authority, Ontario affirmed that: “s. 7 protects against deprivations of rights; it does not establish positive rights or obligations on the state. Nor does it provide protection to purely economic rights, including the right to affordable housing or a minimum standard of living.” In the Attorney General of Canada’s submission: “The Court’s decision in Gosselin did not overrule any previous jurisprudence. Rather the majority decision affirmed that section 7 has not been recognized to provide for positive rights or economic benefits.”

In his 2013 Ontario Superior Court ruling, Justice Lederer granted the governments’ motion to strike the Tamuljaja claim. In response to the Applicants’ argument that the governments’ actions, both in contributing to and failing to address homelessness, had infringed the security of the person of the Applicants and others similarly affected, Justice Lederer opined that: “the programs and decisions noted and complained of are not the cause of the harm

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162 Tamuljaja (SC) (Amended Notice of Application), ibid.
163 Tamuljaja (SC), supra note 158 (Factum of the Applicants (Respondents on the Motion) at paras. 1, 46-47); Tamuljaja (CA), supra note 158 (Factum of the Appellants at para. 6).
164 Justice Feldman noted that the Applicants’ record comprised 16 volumes totalling 10,000 pages containing 19 Affidavits, of which 13 were from experts; Tamuljaja (CA), ibid., at para. 66.
165 Tamuljaja (SC) (Notice of Motion).
166 Tamuljaja (CA), supra note 158 (Factum of the Respondent, the Attorney General of Ontario at para. 2).
167 ibid. at para. 24.
168 Tamuljaja (CA), ibid. (Factum of the Respondent, the Attorney General of Canada at para. 30).
169 Tamuljaja (SC), supra note 158 at para. 152.
described by the applicants. They are, if anything, part of the cure." Justice Lederer was unpersuaded by the Applicants’ contention that the Supreme Court of Canada intended to, and did in Gosselin, leave open the possibility that s. 7 could impose positive obligations on governments to protect life, liberty and security of the person, affirming that: “Section 7 of the Charter does not provide a positive right to affordable, adequate, accessible housing." He also discounted the Applicants’ submission that the important constitutional issues raised in Tamudjaja should not be disposed of without a full hearing, on an interlocutory motion to strike. Instead Justice Lederer concluded: “It is plain and obvious that the Application cannot succeed . . . Quite apart from the question of whether there is a viable claim for breaches of the Charter, what the Court is ultimately being asked to do is beyond its competence and not justiciable.”

In its 2014 judgment, a 2-1 majority of the Ontario Court of Appeal upheld Justice Lederer’s order. In her dissenting opinion, Justice Feldman found that Justice Lederer erred in deciding that the issue of positive obligations under s. 7 was settled law notwithstanding the Supreme Court’s contrary ruling in Gosselin. Even more problematic in her view, was his order to dismiss the Application at the pleadings stage—a misuse of the motion to strike “to frustrate potential developments in the law.” Justice Pardu, with the concurrence of Justice Strathy, agreed with Justice Lederer that the Applicants were arguing “that s. 7 confers a general freestanding right to adequate housing.” She held that the Application contained “no sufficient legal component to engage the decision-making capacity of the courts” and that it was not therefore justiciable. As a result, Justice Pardu held it was unnecessary to consider “the extent to which positive obligations may be imposed on government to remedy violations of the Charter, a door left slightly ajar in Gosselin.” In 2015, the Supreme Court of Canada refused leave to appeal, and the Tamudjaja claim was struck.

170 Ibid. at para. 113.
171 Ibid. at para. 81.
172 Ibid. at paras. 55-56.
173 Ibid. at paras. 147-148.
174 Tamudjaja (CA), supra note 158 at para. 39.
175 Ibid. at para. 62.
176 Ibid. at para. 64.
177 Ibid. at para. 49.
178 Ibid. at para. 39.
179 Ibid. at para. 30.
180 Ibid. at para. 27.
181 Ibid. at para. 19.
182 Ibid. at para. 37.
(b) *Gosselin and the Failure of Constitutionalism*

The Applicants in *Tamuljaja* exercised their rights under s. 24(1) of the *Charter* to seek a judicial hearing and to obtain a legal remedy for a constitutional rights violation grounded in the text of s. 7 and supported by a full evidentiary record. Although Canadian governments are, following Canada’s ratification of the *ICESCR*, under binding international obligation to respect these core socio-economic rights, the Applicants did not argue they had a *Charter* right to housing or to an adequate level of income. Rather they submitted that their s. 7 rights to life and security of the person were infringed by policies and programs that left them homeless, and by governments’ refusal to take appropriate measures to address this situation, thereby threatening the integrity of families, physical and psychological health, personal inviolability and life itself. These types of harms had all been subject to s. 7 review in previous Supreme Court cases. Nevertheless, the Applicants’ *Charter* argument was characterized as a sweeping demand for a freestanding right to housing that fell beyond the ambit of s. 7. Justice Lederer summarized why the *Tamuljaja* claim could not, in his view, be allowed to continue:

> What is being sought here is a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living... Any application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.

The Applicants in *Tamuljaja* were not merely required to meet a disproportionate evidentiary standard or to combat negative stereotypes and judicial preconceptions about the homeless and homelessness. They were denied the very opportunity to have their evidence and arguments fully heard. In spite of the implications of upholding Justice Lederer and the Ontario Court of Appeal’s decision to strike the *Tamuljaja* Application at the pleadings stage, the Supreme Court refused leave to appeal, as it has done in virtually every poverty-related *Charter* case since *Gosselin*. In 2007 for instance, the Supreme Court

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183 *Supra* note 158.

184 *Supra* note 70.


186 *Tamuljaja (SC),* *supra* note 158 at para. 120.
refused leave to appeal the lower courts’ ruling in *R. v. Banks*,188 dismissing a constitutional challenge to the Ontario *Safe Streets Act*.189 The Charter claim was rejected in that case because the lower courts found no evidence that prohibiting panhandling interfered with the homeless claimants’ ability to survive190 and because, in the trial judge’s view, allowing such a claim would “bring all the elements of the welfare state under scrutiny just as surely as a claim to state largesse.”191 In 2008, the Supreme Court denied leave in *Canadian Bar Assn. v. British Columbia*,192 which invoked s. 7 to challenge the civil legal aid system’s failure to ensure that people living in poverty, and especially women, had meaningful access to justice in situations affecting their Charter-protected interests. The B.C. courts ruled that the claim should be struck because “the CBA does not challenge any legislation, nor indeed any government action . . . Rather it seeks a sweeping review of the entire program.”193

In 2009, the Supreme Court denied leave in *Boulter v. Nova Scotia Power Assn. Inc.*194 in which the claimants challenged the province’s approach to electricity pricing on the grounds that it exacerbated the unaffordability of residential hydro services for people living in poverty.195 In rejecting the Applicants’ Charter claim in that case, the Nova Scotia Court of Appeal averred: “That poverty’s plight appeals for relief does not mean the redress is

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189 S.O. 1999, c. 8.

190 *Banks (CA)*, supra note 188 at para. 81; *Banks (SC)*, supra note 188 at para. 50.

191 *Banks (SC)*, ibid. at para. 51.


193 *Canadian Bar Assn. (CA)*, ibid. at para. 35.


And, in 2012, the Supreme Court refused leave to appeal the decision in *Toussaint v. Canada (Minister of Citizenship & Immigration)*, in which the Federal courts dismissed a s. 7 challenge to the federal government’s denial of health care benefits to an undocumented migrant in urgent need of medical care, on the grounds her own conduct was the “operative cause” of any injury to her s. 7 rights, and because Canada might otherwise become a “health care safe haven.”

The Supreme Court’s refusal to grant leave to appeal in these or virtually any other poverty-related s. 7 case in the 15 years since *Gosselin* was decided stands in sharp contrast to its approach to the Charter claim in *Chaoulli v. Quebec (Procureur général)*. The Appellants in *Chaoulli*, an elderly patient who had experienced delays obtaining two hip replacements and a physician engaged in a long-running battle with the province over restrictions on his ability to deliver private care, invoked s. 7 not to defend but to undermine the one socio-

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196 Boulter (CA), supra note 194 at para. 43.


198 *Toussaint* (FCA), ibid. at paras. 72-73; *Toussaint* (FC), ibid. at paras. 91, 93. In its subsequent decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431 (F.C.) at para. 571, the Federal Court ruled that revisions to the Interim Federal Health Benefit Program to exclude certain categories of refugee claimants did not violate s. 7 because “the Charter’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care.”

199 *Toussaint* (FC), ibid. at para. 112; *Toussaint* (FC), ibid. at para. 94. The UN Human Rights Committee recently ruled that Canada’s actions violated Ms. Toussaint’s right to life under article 6 and her right to equality under article 26 of the ICCPR and it ordered Canada to provide Ms. Toussaint “with adequate compensation for the harm she suffered” and “to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.”; UNHRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2348/2014 (August 7, 2018) CCPR/C/123/D/2348/2014, online: <http://www.socialrights.ca/2018/Toussaint%20v%20Canada%202018.pdf>.


201 *Chaoulli* (SC), ibid. at paras. 19-43. After summarizing Dr. Chaoulli’s evidence at trial, Justice Piché observed, at para. 43: “Tout ceci amène le Tribunal à se poser des questions constitutional.”
economic right that is widely recognized in Canada: access to health care based on need rather than ability to pay. Although the claim in Chaoulli was unanimously rejected at trial and by the Québec Court of Appeal, the Supreme Court granted the Appellants leave to appeal. The majority of the court then set aside the trial judge's evidentiary findings and reversed the lower courts' ruling that Québec's prohibition on private health insurance was constitutionally unobjectionable because it was designed to safeguard the publicly funded system upon which everyone, including those unable to pay for private care, relies.

In doing so, unlike in Gosselin, the majority did not question whether the evidence of two individual claimants was sufficiently representative of the impact on all Québec patients of prohibiting private insurance. Nor did it doubt the sufficiency of the evidence of the single witness who, against the weight of expert opinion in the case, maintained that allowing parallel private care would provide a solution to wait times. The majority rejected Justice Delisle's conclusion at the Court of Appeal that the Appellants were asserting a right to buy private insurance—an economic right that was excluded from s. 7 of the Charter. The majority did not suggest the Appellants were asking the court to recognize a free-standing right to private health care. Rather it emphasized that...
the Appellants were arguing only that their life, liberty and security of the person were threatened by Québec's prohibition on private health insurance.\textsuperscript{209}

The majority in Chaoulli was unconcerned by issues of justiciability or institutional competence raised by the Appellants' challenge to the single-payer health care system. As Chief Justice McLachlin affirmed:

> While the decision about the type of health care system Québec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the Charter. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it.\textsuperscript{210}

The result was a Supreme Court decision highly prejudicial to the Charter rights and health interests of people living in poverty. Disregarding the evidence of the negative impact of striking down the ban on private insurance for those who depend on the publicly funded system,\textsuperscript{211} the majority granted a remedy available only to individuals who could afford to buy private insurance to jump the public queue.\textsuperscript{212} The majority's ruling in Chaoulli appeared to suggest that, while s. 7 does not guarantee access to health care based on need, it does ensure a right to health care based on ability to pay.\textsuperscript{213}

In this context, the Supreme Court's failure to grant leave to appeal in Tamuljaja, and to finally revisit its decision in Gosselin, represents clear failure of constitutionalism. As the Charter Committee Coalition argued in its intervention before the Ontario Court of Appeal in Tamuljaja, the issues raised in the s. 7 Charter claims of people living in poverty:

> ...bear directly on the relationship between members of the most marginalized groups in Canadian society and the constitutional rights and values that underpin Canada's constitutional democracy.... The

\textsuperscript{209}Ibid. at paras. 103; 108, 110.

\textsuperscript{210}Ibid. at para. 107.

\textsuperscript{211}Ibid. at para. 152.


\textsuperscript{213}The Chaoulli decision has prompted a further s. 7 challenge to the single payer system, led by Dr. Brian Day in B.C. in Cambie Surgeries v. British Columbia (Medical Services Commission), Doc. S090663 (Vancouver); see also BC Health Coalition, "Clinics Case Court Documents", online: <http://www.bchealthcoalition.ca/what-you-can-do/save-medicare/court-documents>; Martha Jackman, "From Chaoulli to Cambie: Charter Challenges to the Regulation of Private Health Funding and Care" in Colleen M Flood & Bryan Thomas, eds, Is Two-Tier Health Care the Future? (Ottawa: University of Ottawa Press, 2019) (forthcoming).
courts have a constitutional mandate to interpret and apply the Charter in a manner that secures every individual in Canada the full benefit of the Charter’s protection. This, rather than any preconceived idea of what kinds of issues (and, by definition what types of claimants) belong in the courtroom should be the starting point of any Charter analysis.  

6. CONCLUSION

In the Tanudjaja case, a single judge on a motion to strike essentially overruled the Supreme Court of Canada, declaring:

The law is established. As it presently stands there can be no positive obligation on Canada and Ontario to put in place programs that are directed to overcoming concerns for the “life, liberty and security of the person . . . The majority in Gosselin does not depart from this view. It confirms what has been understood since the early days of the Charter.

Notwithstanding the doctrinal significance and access to justice consequences of allowing Justice Lederer’s ruling to stand, the Supreme Court refused leave to appeal the Tanudjaja decision. The experience of Charter claimants in poverty-related cases before and since Gosselin, culminating in the motion to strike in Tanudjaja, is one of constitutional exclusion — the Supreme Court’s approach to s. 7 having effectively immunized an entire sphere of government action from Charter review. By imposing discriminatory evidentiary burdens on those challenging government action and inaction leading to hunger, poverty and homelessness, and in some cases ignoring their experience and evidence outright, and by characterizing their constitutional arguments as non-justiciable demands for free-standing rights not found in the Charter, the courts have erected a nearly impenetrable barrier to the life, liberty and security of the person claims of people living in poverty. In those too few Charter cases in which the poverty-related claims been accepted by the courts, it is precisely because they fit a negative rights paradigm and demand only that governments do nothing.

In the 2008 Victoria (City) v. Adams215 case for instance, the homeless residents of a tent city in Victoria were successful in their s. 7 challenge to a municipal bylaw prohibiting them from erecting temporary structures in public parks at night.216 At trial, Justice Ross found that the shortage of shelter spaces in Victoria meant that “hundreds of people are left to sleep in public places in the City”217 and that the government’s interference with homeless people’s ability to

214 Tanudjaja (CA), supra note 158 (Factum of the Interveners: Charter Committee Coalition at paras. 1, 6).
216 Adams (SC), ibid. at para. 70.
217 ibid. at para. 58.
provide themselves with temporary shelter exposed them to a risk of serious harm, including death by hypothermia. In deciding that the bylaw violated s. 7, Justice Ross underscored the fact that the homeless claimants were not arguing the government was required to provide them with adequate shelter, but instead were challenging negative restrictions on their ability to shelter themselves, akin to the situation in *Chadouli*. In upholding Justice Ross’s ruling striking down the Victoria bylaw, the B.C. Court of Appeal also emphasized that it was applying s. 7 as a negative “restraint” on government action, rather than as a source of positive obligations to address the problem of homelessness or the rights of the homeless.

Examining the role of judicial interpretation in the realization of socio-economic rights in Canada, Bruce Porter has observed:

Negative rights interpretations have been adopted not on the basis of coherent or reasonable principles of interpretation but rather in the service of preconceived ideas of a restricted role of courts. The consequences of such restrictive interpretations for the integrity of the meanings of rights are severe. By retreating from understandings that may require positive measures or transformative change, courts stultify interpretation around existing patterns of discrimination, marginalization and exclusion. They exclude from their interpretation of rights the circumstances of disadvantaged and marginalized groups — those whose rights are most frequently denied by existing patterns of exclusion and by governments’ failures to take positive measures to address these systemic violations.

In sharp contrast to the current judicial approach, in the period leading up to and following its enactment, disadvantaged groups advocated for an interpretation and application of the *Charter* that would reflect and reinforce Canada’s international socio-economic rights commitments, moving beyond the discredited and outmoded dichotomy between positive and negative rights that was abandoned under the *UN Declaration* and the two International

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218 *ibid.* at paras. 119-120.
Disadvantaged groups insisted that governments' inattention to, or deliberate failure to address the consequences of unemployment, homelessness, poverty, inadequate health services, and lack of social supports, should receive the same level of Charter scrutiny as direct violations of security of the person and other fundamental rights. As Justice Arbour underscored in Gosselin:

> Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases . . . positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.

Three decades on, people living in poverty would surely have anticipated that the s. 7 right to life, liberty and security of the person would, as Louise Gosselin believed, translate into a level of social assistance that didn’t force those in need to choose between hunger and homelessness. They would take as a given Chief Justice McLachlin and Justice Lebel’s insistence that “the Charter, as a living document, grows with society and speaks to the current situation and needs of Canadians. Thus Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter.” 223 People living in poverty would have predicted the Charter would, as Jennifer Tanudjaja affirmed, require Canadian governments to adopt strategies to combat and eventually put an end to poverty and widespread housing insecurity. They would have expected the courts to recognize the disproportionately adverse impact government inaction has on the most socially and economically disadvantaged members of Canadian society: Indigenous people, people with disabilities; new immigrants and refugees, and sole support mothers and their children. 224 Instead of one tenuous step forward by the Supreme Court of Canada in Gosselin, they would have expected Canadian courts at every level to hold governments fully accountable for failing to take affirmative steps to remedy poverty and the serious human rights violations that result. People living in poverty could not have foreseen that, 35 years after the Charter’s enactment, s. 7’s promise of life, liberty and security of the person would offer no more than a right to sleep in a park at night under a piece of plastic or a cardboard box. 225 Most of all, people...

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221 Supra notes 69-71.
222 Gosselin (SCC), supra note 5 at para. 377.
223 Health Services Assn, supra note 74 at para. 78.
224 One in seven people in Canada live in poverty, including 25.3% of Indigenous people; 23% of people with disabilities; 34.2% of new immigrants and refugees; 32.4% of single parent families (80% of which are female-led) and 43.4% of children in those families; Poverty Trends 2017, supra note 10 at 1-4.
living in poverty could not have imagined their Charter claims would no longer even be heard. Yet that, to all appearances, is the legacy of Gosselin.

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See Jackman, "Sleeping under a Box?", supra note 219.